Date: Oct. 24, 1995

Case No.: 95-TLC-28

In the Matter of:

MUSTACHE CAFE,
Employer

on behalf of

IRAJ SOTUDE,
Alien

BEFORE: Huddleston, Vittone and Wood
Administrative Law Judges

John M. Vittone
Acting Chief Judge

ORDER OF DISMISSAL

On May 11, 1995, the Certifying Officer (CO) issued a Final Determination denying the Employer's application for a temporary labor certification under the H-2B program. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184; 20 C.F.R. Part 655, Subpart A. The CO's Final Determination states that "[a] denial of certification or a notice that certification cannot be made is not reviewable by the Department of Labor, but may be appealed to the [Immigration and Naturalization Service (INS)]." In a submission postmarked August 3, 1995, the Employer submitted a request to the Board of Alien Labor Certification Appeals[1] (BALCA) seeking review of the CO's denial of temporary certification pursuant to 8 C.F.R. § 214.2(h). The Employer's submission presents the question of whether BALCA or an individual Department of Labor (DOL) administrative law judge (ALJ) has the authority to review a CO's denial of certification for a temporary alien labor application involving an H-2B worker.

The Administrative Procedure Act indicates that an agency must provide a hearing presided over by an administrative law judge appointed under 5 U.S.C. § 3105 only "when required by statute to be determined on the record after opportunity for an agency hearing." 5

[1] BALCA is an administrative-judicial review board consisting of members appointed from the ranks of the Department of Labor's administrative law judges. It is not part of the Immigration and Naturalization Service or the Department of State.

U.S.C. § 554. *See also* 5 U.S.C. § 556. The Immigration and Nationality Act (INA) does not prescribe that decisions of the Department of Labor pursuant to the INA be made pursuant to 5 U.S.C. §§ 554 and 556. Thus, there does not appear to be a statutory entitlement to an ALJ hearing for a decision of a CO to deny a certification for an H-2B applicant either under the APA or the INA.[2]

An agency may provide, by regulation, an opportunity for an ALJ hearing even if the underlying statute does not require such a hearing.[3] In temporary labor certification cases, DOL's regulations do provide for ALJ or BALCA hearings in regard to certain temporary alien employment applications such as H-2A temporary agricultural workers (20 C.F.R. § 655.112), logging and non-H-2A agricultural workers (20 C.F.R. § 655.212), and nonimmigrant registered nurses (20 C.F.R. § 655.320). The regulations, however, are silent in regard to any agency review of a determination made by the Employment and Training Administration on an application for certification pursuant to the H-2B program. *See* 20 C.F.R. § 655.3(c).

The Employer argues that BALCA has authority to hear the instant appeal pursuant to 20 C.F.R. § 656.26, which states that "[i]f a labor certification is denied, a request for review of the denial may be made to the Board of Alien Labor Certification Appeals..." The Employer's argument is that the words "labor certification" in this sentence are not modified by any adjective

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[2] In *Yong v. Regional Manpower Admr, U.S Dept. of Labor*, 509 F.2d 243 (9th Cir. 1975), the court observed that where the underlying statute does not require a hearing on the record, the APA does not require a formal, quasi-judicial administrative hearing. In *Yong*, the court went on to find that the statute read in conjunction with the DOL immigration-related regulations at issue implied that the applicant was entitled to challenge the record upon which the initial denial was predicated. In that case, however, the Department's regulations indicated that there was an opportunity for further administrative review.

In *Sung v. McGrath*, 339 U.S. 33, 70 S. Ct. 445, 94 L. Ed. 616 (1950), the Supreme Court held that Constitutional due process may require a hearing at the administrative level, even if the underlying statute does not explicitly require a hearing. If so, the APA's hearing requirements at 5 U.S.C. § 554 would be applicable. Even if this panel was to conclude that due process requires a hearing concerning the denial of a certification under the H-2B program, the Board has held in an en banc decision that it lacks inherent or express authority to rule on the validity of a regulation or to invalidate a regulation as written. *Dearborn Public Schools*, 91-INA-222 (BALCA Dec. 7, 1993) (en banc), citing *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1117 (6th Cir. 1984).

[3] The CO takes the position that INS has the exclusive authority to review a denial of an H-2B temporary alien labor certification by DOL. CO's brief at 6-14. We doubt that DOL would be precluded, because of its solely advisory role on H-2B applications, from issuing a regulation that provides an appeal process within DOL prior to a final decision on an H-2B certification by this agency. Nonetheless, since we find that neither the INA, the APA nor the DOL regulations provide BALCA or an individual DOL ALJ with the authority to review such a determination, and we need not decide this issue.

or adjectives that "would limit, or imply a limit on, BALCA's authority to review denial of any type of labor certification . . . ." Employer's brief at 3. The definitions section of 20 C.F.R. Part 656, however, states that "*[l]abor certification* means the certification to the Secretary of State and to the Attorney General of the determination by the Secretary of Labor pursuant to section 212(a)(14) or the Immigration and Nationality Act (8 U.S.C. 1182(a)(14)) . . ." 20 C.F.R. § 656.3. Section 1182(a)(14) of the INA involves permanent alien labor certification. H-2B applications, in contrast, are governed by 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b) and 1184. Given the definitional limitation in section 656.3, it cannot be concluded that BALCA's jurisdiction is expanded by 20 C.F.R. § 656.26 to cover all labor certification determinations.

The fact that certain temporary alien labor certification determinations are subject to review by BALCA does not implicitly anoint BALCA with the authority to review all such determinations. Rather, where BALCA review is available in temporary alien labor situations, the regulations explicitly state that authority. *See, e.g.*, 20 C.F.R. §§ 655.112 and 655.320.

In sum, no statutory or regulatory authority exists to provide BALCA or an individual DOL ALJ with the authority to review a CO's denial of certification for a H-2B category worker. The Employer's sole avenue of formal administrative appeal is pursuant to the INS regulation found at 8 C.F.R. § 214.2(h)(6)(iv)(D), which provides that if a certification by the Secretary of Labor cannot be made, a petition containing countervailing evidence may be filed with the Director of the INS as an attachment to the visa petition.[4] Accordingly

IT IS ORDERED that this matter is hereby DISMISSED.

At Washington, D.C.

For the Panel:

John M. Vittone
Acting Chief Judge

JMV/trs

[4] *See also Operations Instructions of the Immigration and Naturalization Service* 214.2(h)(5) (reproduced in 9 Immigration Law and Procedure (Matthew-Bender) Rel.61-5/93 at 567-569); Administrator for Regional Management, Employment and Training Administration, U.S. Dept. of Labor, *General Administration Letter No. 1-95* at 8 (Nov. 10, 1994) (reproduced at 60 Fed. Reg. 716 (Feb. 7, 1995).